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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 175

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, LOCAL NO. 181, ET AL.,

Petitioners,

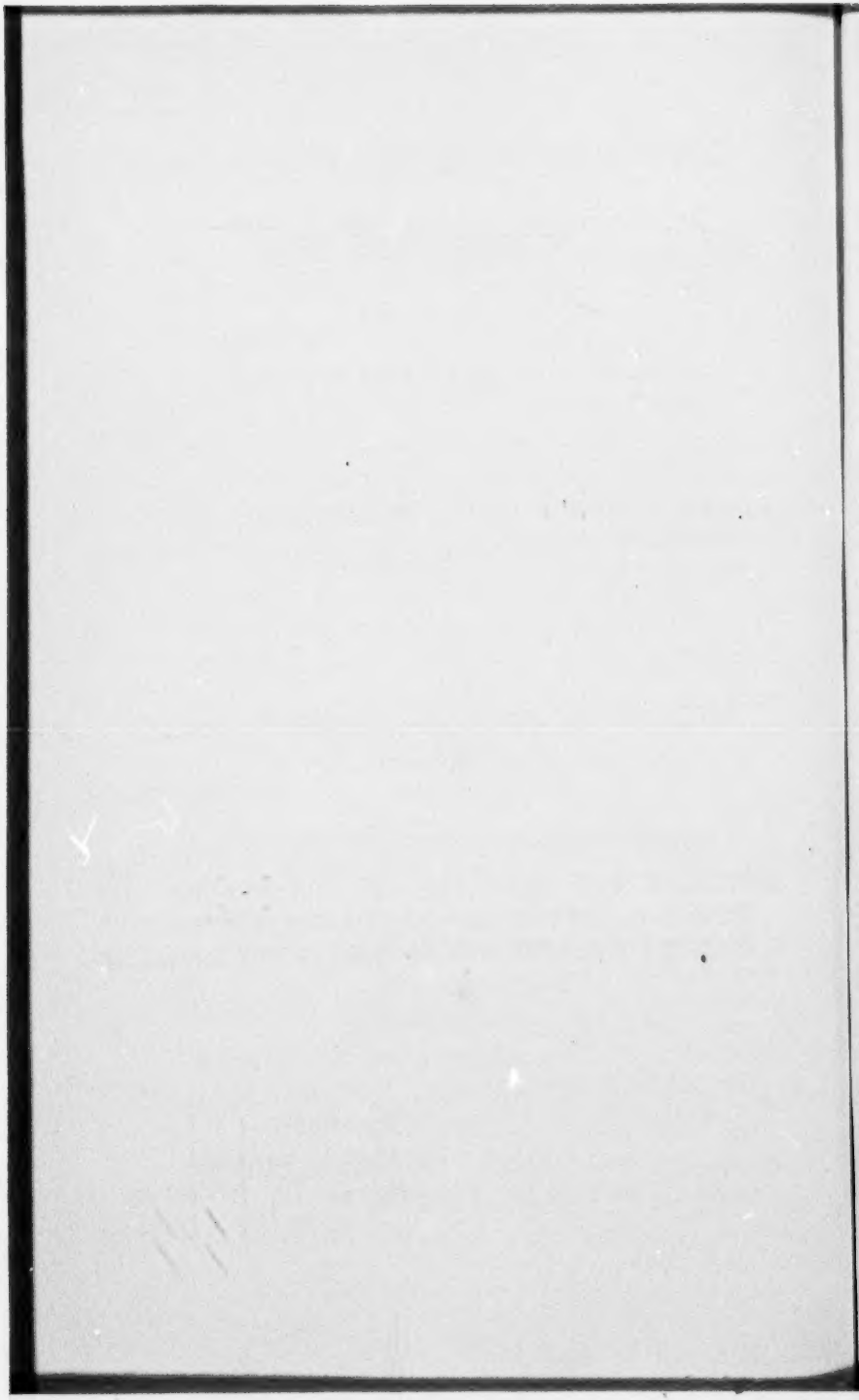
vs.

BLUE BOAR CAFETERIA COMPANY, INCORPORATED,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY AND BRIEF IN SUPPORT THEREOF.

J. W. Brown,
Ben Gettler,
Herbert L. Segal,
Attorneys for Petitioners.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 175

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, LOCAL NO. 181, 1412 WASHINGTON BLDG.; ELGIN G. BARTLETT, 1412 WASHINGTON BLDG.; EDMUND F. GRIMES, 1401 WASHINGTON BLDG.; MATTHEW W. DAVIS, 1301 WASHINGTON BLDG.; SAM EZELLE, 410 WASHINGTON BLDG.; EDWARD H. WEYLER, 1401 WASHINGTON BLDG.; ARTH. J. POTTER, 1412 WASHINGTON BLDG.; FRED B. WOLF, 410 WASHINGTON BLDG.; MRS. SAM EZELLE, 1312 RAMMERS AVENUE; MRS. HELEN MORGAN, MRS. AILEEN B. CAMPBELL,

Petitioners,

vs.

BLUE BOAR CAFETERIA COMPANY, INCORPORATED,

Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners herein pray that a Writ of Certiorari be issued to review the Decree entered December 19, 1952,

and the Order denying petitioners' Motion for a Rehearing thereof entered February 13, 1953, in the Court of Appeals of the Commonwealth of Kentucky. That Decree and Order found the judgment of the Jefferson Circuit Court, Chancery Branch, Second Division, Kentucky, allowing petitioners to picket to be erroneous, and ordered that said judgment be reversed and cause remanded with directions that a new judgment be entered enjoining all picketing by the petitioners herein. The said Chancery Branch had denied respondent's request that picketing by the petitioners be enjoined.

Summary Statement

Blue Boar Cafeteria Company, Inc., hereinafter called Company, is a corporation which operates two cafeterias in the city of Louisville, Kentucky. Hotel & Restaurant Employees and Bartenders International Union, Local No. 181, hereinafter referred to as the Union, is an unincorporated association chartered by the Hotel & Restaurant Employees and Bartenders International Union, affiliated with the American Federation of Labor. The Union is composed of persons employed in the culinary, bartender and hotel crafts in the Louisville, Kentucky, area.

The Company and the Union have had dealings during two separate intervals of time. The first occasion occurred during the period from September, 1949, to June, 1950. The other contract of the parties occurred in May, 1952, and June, 1952. The occurrences in those periods are therefore separately set forth below.

A. The September, 1949, to June, 1950, Period

The first relation between the Company and the Union occurred on September 16, 1949, when representatives of the Kentucky State Federation of Labor requested the

Company to bargain with the Union. The Company refused. (R. 139)

Thereafter, the Union requested the Commissioner of Industrial Relations of Kentucky to hold an election among the employees of the Company to determine whether those employees desired to be represented by the Union, in accordance with Kentucky Reviesd Statute 336.040. At that time there was shown to the Commissioner of Industrial Relations sufficient signed membership cards and other proof to demonstrate that a substantial number of the Company's employees were members of the Union and desired to be represented by it. (R. 154) (R. 163)

The Commissioner of Industrial Relations of Kentucky, after being satisfied that the Union did represent a substantial number of the employees of the Company, sent a letter to the company, advising it that the Commissioner would conduct an election on the premises of the Company to determine whether or not the Union "is the accredited representative for bargaining purposes of your employees." *Blue Boar* v. *Hackett*, 312 Ky. 288, 227 S. W. (2d) 199.

Respondent Company, however, refused to permit the Commissioner of Industrial Relations to conduct an election on its premises. It filed a petition requesting injunctive relief against the Commissioner of Industrial Relations to prevent him from conducting such an election. The Circuit Court of Jefferson County sustained a Demurrer to the Petition and dismissed it. The Company, however, appealed, and the Kentucky Court of Appeals reversed the holding of the Circuit Court of Jefferson County and held that the Commissioner of Industrial Relations had no right to hold such an election. The opinion of the Court of Appeals in that case is reported in *Blue Boar* v. *Hackett*, 312 Ky. 288, 227 S. W. (2d) 199. That opinion was rendered on February 17, 1950.

Thereafter, for several more months, the Union attempted to persuade the Company to bargain with it, but was unsuccessful. During the nine-month period of fruitless efforts to obtain recognition, the number of Union members employed by the Company steadily dwindled as they became discouraged or were fired or quit their employment with the Company. (R. 163) (R. 12.)

Finally, on June 17, 1950, the Union commenced peaceful picketing of the Company's cafeterias. On June 28, 1950, an action was filed in Jefferson Circuit Court, Chancery Branch, Second Division, by Company to enjoin the Union from all picketing, including peaceful picketing. A Temporary Restraining Order was issued without notice. Thereafter, after a hearing for a Motion on a Temporary Injunction, an order sustaining the motion was entered July 13, 1950. (R. 13)

The Chancellor refused to give weight to the fact that the Union had represented a substantial number of the employees of the Company at the inception of the dispute, and further, that the Union had attempted to conclusively demonstrate its majority through an election to be conducted by the Commissioner of Industrial Relations of Kentucky. The Chancellor further refused to give weight to the fact that the Union had been prevented from proving its majority by the refusal of the Company to permit an election.

The Chancellor stated in his opinion in granting the temporary injunction: (R. 12)

> "From the proof taken and the affidavits filed, it is conclusively shown that no employee of the plaintiff is a member of the defendant Union, and the proof likewise shows that the picketing has been orderly and peaceful, and that no violence of any nature has occurred."

The Chancellor stated, as to the question to be determined by him, the following: (R. 12)

> "The whole question to be determined here is—May a court of equity enjoin peaceful picketing where there is no dispute between an employer and employee, and where the picketing is being done by a union who does not represent any employee?"

The Chancellor, after referring to two cases of this Court, found on that question as follows: (R. 13)

> "The Court is of the opinion that to permit an or-organization who does not represent any employees, to exert economic pressure upon the employer, hoping thereby because of the loss of revenue through said economic pressure that the employer would exert influence upon its employees to recognize a picketing organization, must be declared as unlawful picketing, for to hold otherwise would invite chaos and provide a means whereby every organization who is not designated as the bargaining agent might picket an employer and injure his business for the sole purpose of having the employees join each and every union that saw fit to make demand for the recognition of their union. Going one step further, there is a possibility that a competitor of an employer might resort to this same tactic for the purpose of exerting economic pressure and damaging his competitor and claiming he is within his rights on the ground of freedom of speech."

The Union appealed the granting of this temporary injunction to the Court of Appeals of Kentucky. That Court, however, on July 14, 1950, refused to dissolve the temporary injunction. (R. 17)

B. The May, 1952, to June, 1952, Period

From June, 1950, until May, 1952, there were no contacts of any sort between the parties. There were no claims or

allegations by any of the parties either in the pleadings or in the evidence that there were any meetings, conferences, conversations, discussions or any other communications of any sort whatsoever during that two-year interval.

All of the contacts between the parties in May, 1952, and June, 1952, are set forth in three letters, which were stipulated to below (R. 21 R. 247) and are marked "Stipulation Exhibit A," "Stipulation Exhibit B," and "Stipulation Exhibit C." Since those three letters constitute the only contact in that period of May, 1952, and June, 1952, and since they indicate the complete relationship between the parties when the case was heard on its merits, we believe that those letters are of the utmost importance in this case. We are, therefore, setting forth the three letters in their entirety.

May 26, 1952

"Blue Boar Cafeteria
644 So. 4th St.
Louisville, Ky.

"Gentlemen:

"I have been instructed to inform you on behalf of Hotel & Restaurant Employees Union, Local No. 181, that this union represents a group of your employees. That we are hereby requesting that you negotiate a collective bargaining agreement with us covering only the employees that we represent.

"We are not and we will not request that you bargain with us for any employees that we do not represent, or that any effort be made on your behalf to ask, urge, coerce or demand that any other employees other than those we represent join this Union."

"Very truly yours,

"HERBERT L. SEGAL"

The immediately preceding letter is Stipulation Exhibit A (R. 23) (R. 247).

Mr. Herbert L. Segal, signatory in the preceding letter, is the attorney for the Local Union. (R. 245)

On the 12th day of June, 1952, the attorney for the Union received a letter from Blue Boar stating as follows: (Stipulation Exhibit B) (R. 24) (R. 247)

"Mr. Herbert L. Segal, Counsellor at Law
603 Marion E. Taylor Bldg.
Louisville 2, Ky.

"Dear Sir:

"In your letter dated May 26, 1952, you stated that the Hotel and Restaurant Employees Union, Local 181, represented some of our employees and you requested that we enter into negotiations with the union concerning the employees it claims to represent. Receipt of your letter was the first knowledge that we had of your connection with any Blue Boar employees.

"As your letter did not disclose any authorization by any of our employees for the union to act for them and as it further did not disclose the names of our employees claimed by the union as members, we declined to answer until we could discuss the matter with our attorney, Robert E. Hatton.

"As Mr. Hatton was then out of the city and state and has just today returned to his office, we are for the first time able to reply to your letter.

"Although our president, L. E. Johnson, is out of the state, nevertheless I am instructed to inform you that this company does not feel justified in entering into bargaining negotiations affecting the personal rights of certain of our employees who are to us unknown.

"Should you care to disclose your authority and name the persons you represent, we will be glad to reconsider our position.

"Yours very truly,

"J. E. Goad, *Secretary-Treasurer*
"Blue Boar Cafeteria Company."

On June 25, 1952, a letter was sent by the attorney for the Union to the attorney for the Company, which letter stated as follows: (Stipulation Exhibit C) (R. 25) (R. 247)

"Mr. Robert Hatton, Attorney
M. E. Taylor Bldg.
Louisville, Kentucky

"Dear Mr. Hatton:

"In reply to your letter, may I state that we will not reveal at this time the names of the employees whom we represent and have authority to bargain for because they are fearful of losing their jobs if their identity is known. This fear is based upon the facts that previous employees have been discharged for being members of this union.

"We are always ready to bargain with you in good faith for these employees by identifying their job classification; and then, at the time the collective bargaining agreement is drawn up, we can reveal our members to you with the understanding that they will not be discharged for being members of this union or for union activity.

"Yours very truly,

"HERBERT L. SEGAL"

Since June, 1950, the Company has refused to meet with and bargain with the Union on behalf of the employees it represented. Further, in the period from May 30 to June 2, 1952, five of the seventeen employees who were members of the Union were discharged by the Company. (R. 250, 252, 253, 254, 255.) These employees were discharged under circumstances which led them and petitioners to believe that their discharge was because of their activity on behalf of, and membership in, the Union. The record reveals that each of these five employees was discharged within four days of each other (R. 250-296); that such discharges occurred within a few weeks after their joining the Local

Union (R. 268, 281, 282, 287); that such discharges occurred approximately three days after receipt by Company of the letter from Mr. Segal, Stipulation Exhibit A, which informed the Company that the Union represented some of the employees; that such discharges occurred within a short time after an anti-union and pro-company employee learned of the Union activity (R. 268, 274, 273, 283); that no valid reasons were given for discharging said employees at the time of their discharge (R. 269, 282, 288); that the reasons advanced by the Company at the final hearing for the discharge of the employees were either specious or reasons which existed long before these employees joined the union and participated in union activity, (R. 273) but which the Company had never considered sufficient to discharge these employees for until they joined the Union and participated in Union activities (R. 276, 277, 279, 288). The record further shows that a Company Supervisor, Mr. Foster, told some of these employees on discharging them, "I understand you girls are not satisfied working here . . .; that you aren't satisfied in the salary you make . . . I figure if you aren't satisfied with the salary you are making, there are plenty of other places you can work" (R. 269, 282). The record further shows that these said employees had never complained to any of the management personnel or to the particular supervisor who discharged them about their salary (R. 269).

As of the date of final hearing of September, 1952, there were, therefore, two matters in controversy between the Company and the Union as follows:

1. A claim by the Union that five employees had been discharged for union membership and union activity.

2. The request by the Union that the Company negotiate a collective bargaining agreement with it concerning only

those people whom it represented, and the refusal by the Company to comply with that request.

As to the first matter in controversy, namely, the discharge of the five employees, the Circuit Court of Jefferson County found as follows: (R. 31)

> "It is realized that a Union is faced with a difficult task in attempting to prove that an employer discharged its members for union activity. Certainly an employer never tells an employee in so many words, 'you are being fired because of union activity.' Yet, it appears to the Court that before an employer could be held responsible for having discharged an employee for union activity, there should be some stronger evidence than "appears in this case." . . . "On the whole, the Court is of the opinion that defendants have not by a preponderance of the evidence established that these five employees were discharged solely for union activity or because they became, as alleged members of the Union." (R. 31)

On this point the Court of Appeals of Kentucky stated:

> ". . . we think the proof amply sustains this finding by the Chancellor." (R. 51)

If the facts surrounding the dismissals indicated that a legitimate controversy existed between the parties, Kentucky abridged the rights of the union members when it enjoined their picketing. It was not necessary for the Court of Appeals to settle the controversy—it was only necessary to determine that it existed. Such a labor dispute having been shown, picketing as a defensive measure by the Union should have been permitted, since nothing in the Law of Kentucky or its public policy prohibits the same.

As to the second point of controversy, that is, the request by the Union that the Company bargain with it for the em-

ployees and its representatives and the refusal of the Company so to do, the Circuit Court of Jefferson County stated as follows:

> "Moreover, counsel for defendants contend that, aside from the question of these five employees, they have a labor dispute with the plaintiff because they have written a letter to the plaintiff requesting that they be permitted to represent, not a majority of the employees of plaintiff, but only the employees who are members of the Union in an effort to negotiate a collective bargaining agreement. In that letter written by their attorney, defendants specifically said that the plaintiff would not be requested to bargain with them for any employees that they did not represent, or that any effort be made to coerce other employees to join the Union. In reply to this letter the Blue Boar wrote a letter saying it did not feel itself justified in entering into bargaining negotiation relative to employees whose names were not known to the Blue Boar. In response to this last letter defendants, again through their attorney, write that they would disclose the names of the members they represented only at the time the collective bargaining agreement might be drawn in order to be sure that the persons they represented would not be discharged for union activity. This exchange of letters the Union contends constitutes a labor dispute between plaintiff and defendant.
>
> "It appears to the Court that it is unnecessary to decide whether or not the mere existence of a disagreement as to the reasons for the discharge of these employees constitutes a labor dispute; whether or not the exchange of letters mentioned above constitutes a labor dispute; if the law of Kentucky is to the effect that peaceful picketing is permissible against an employer who has no member of the union in his employ" (R. 31).

The Court of Appeals made no finding as to this second controversy. It simply stated:

> "The union seeks to base its case upon the narrow contention that it represents the five employees who were discharged and that it is on behalf of these persons that it is entitled to be considered by Blue Boar as a bargaining agent. While we have doubts as to whether these persons discharged for cause, possess the necessary employee status to form the basis for such representation, we feel that the record will not support the ground urged by the union, because the facts are undisputed that each time representatives of Blue Boar and the union met, the union demanded that Blue Boar recognize it and bargain with it on behalf of its employees. Because Blue Boar will not 'recognize' it or contract to 'organize' with it, the union insists it has a legal right to picket Blue Boar's premises in order 'to acquaint the public with these facts'" (R. 55).

It should be noted, however, that although the Court of Appeals states, "that each time representatives of the Union and Blue Boar met, the union demanded that Blue Boar recognize it and bargain with it on behalf of its employees," the record is clear that after June, 1950, no meetings or contacts of any sort were had between the Company and the Union except for the exchange of letters in May and June of 1952, which letters are set forth in full above. Nor was there any claim by the Company that there was any contact or meetings other than those particular letters during that two-year interval.

The injunction ordered by the Court of Appeals enjoined all picketing of any sort whatsoever. It did not, as in the case of *Building Service Employees* v. *Gazzam*, 339 U. S. 532, enjoin picketing for a specific unlawful purpose. Nor did the Kentucky Court distinguish between legitimate picketing and abusive picketing. Instead, it broadly en-

joined *all* picketing, peaceful or otherwise, for a legitimate purpose or for an illegitimate purpose.

Opinions Below

The Jefferson Circuit Court, Chancery Branch, Second Division, filed an opinion July 13, 1950, simultaneously with the granting of a temporary injunction against all picketing. This opinion is not reported, but is set forth in full in the Record (R. 12).

An opinion was handed down by a different Chancellor of the same Court in October, 1952, after final hearing. In that opinion the Court set forth its reasons for refusing respondent's request to enjoin all peaceful picketing by petitioners. This opinion is not reported, but is set forth in full in the Record (R. 28).

On December 19, 1952, the Kentucky Court of Appeals reversed the judgment of the Jefferson Circuit Court, Chancery Branch, Second Division. The opinion rendered by the Court of Appeals is reported in —— Ky. ——, 254 S. W. (2d) 335, 31 LRRM 2339. The petitioners' application for a rehearing was denied on February 13, 1953, without written opinion.

Each opinion makes it clear that the question of a possible invasion of a right, privilege, or immunity under the First and Fourteenth Amendments to the Constitution of the United States by forbidding all peaceful picketing was the question before the Court. In that regard, each of the Courts involved examined the decisions of this Court, the Supreme Court of the United States, and arrived at their conclusions based on their interpretations of the decisions of this Court. Thus, in his opinion after the hearing of the temporary order, Judge Miller of the Circuit Court of Jefferson County states as follows:

> "The whole question to be determined here is—May a Court of equity enjoin peaceful picketing where there

is no dispute between employer and employee and where the picketing is being done by a union who does not represent any employee?

"The Supreme Court of the United States in the case of American Federation of Labor v. Swing (312 U. S. 321), held that a union cannot be enjoined from peaceful picketing solely on the ground that the picketing is carried on by persons not employed therein. Kentucky seems to have followed this rule (Blanford v. Press Publishing Company, 286 Ky. 657), on the theory that the Supreme Court's decision in the Swing case supra was conclusive.

"However, it was later held by the Supreme Court of the United States in the case of Carpenters and Joiners Union v. Riter's Cafe (315 U. S. 722), that although a State is powerless to prohibit absolutely all peaceful picketing without regard to purpose or circumstances, still it is within the power of the State Court to define unlawful picketing. Thus, it appears that there is a great conflict of law upon this one narrow issue" (R. 12).

The Court then goes on to find that all peaceful picketing may be enjoined in such circumstances where there is no dispute between employer and employee, and where the picketing is being done by a union which does not represent any employee. It is apparent that the decision of the Court is based on the fact that it believed that the holding of this Court in *Carpenters & Joiners Union* v. *Ritter's Cafe*, 315 U. S. 722, overruled the decision of this Court in *A. F. L.* v. *Swing*, 312 U. S. 321. Judge Lampe of the Circuit Court of Jefferson County, in refusing to enjoin all peaceful picketing in 1952, also made it clear that he was basing his decision on the opinions of this Court and that the problem before him was a problem arising under the Constitution of the United States and, in particular, the First and Fourteenth Amendments thereto. The Court of Appeals also made it clear in its opinion that its decision

was similarly based, even though it arrived at a different conclusion.

Those decisions are discussed hereinafter under the caption "Reasons Relied on for Allowance of Writ of Certiorari."

Jurisdiction

Jurisdiction is conferred on this Court to review the cause by Writ of Certiorari by Section 344 of the Judicial Code (United States Code, Title 28, Section 1257(3), June 25, 1948, c. 646, 62 Stat. 929).

Questions Presented

1. Has a State Court overstepped the bounds of the First and Fourteenth Amendments to the Constitution of the United States by forbidding *all* peaceful picketing on the holding that it is contrary to the public policy of the state to allow any picketing when a purpose of the Union is to obtain recognition as collective bargaining representative?

2. Has a State Court overstepped the bounds of the First and Fourteenth Amendments to the Constitution of the United States by forbidding *all* peaceful picketing on the holding that it is contrary to the public policy of the state to allow any picketing when a Union has requested an employer to bargain with it only for the employees represented by the Union?

3. Has the State Court overstepped the bounds of the First and Fourteenth Amendments to the Constitution of the United States by finding that if a Union claims that an employer has discharged employees for Union activities and Union membership, that the Union may not peacefully picket to proclaim the facts of such dispute to the public, unless it is established in a court of law by a preponderance of the evidence that such employees were discharged

solely for Union activity or because they became members of the Union?

4. Is there reasonable basis in the record for the Court's finding on which it based its judgment and order, ordering the lower court to enjoin all peaceful picketing?

Raising of Constitutional Questions

The titles, rights, privileges and immunities of petitioners under the Constitution of the United States, which are involved in the instant cause, were set up by petitioners in Affidavit of Elgin C. Bartlett, filed in opposition to Motion for Temporary Injunction (R. 80). Said Affidavit was filed July 5th, 1950, before issuance of temporary injunction and seven days after filing the Petition herein, and was filed by petitioners on the first day documents were filed by petitioners in this cause. The Constitutional question was also raised in Brief and arguments for petitioners in opposition to Motion for Temporary Injunction and Motion to Dissolve Injunction. The question was also raised by Brief and arguments of petitioners at the close of the final hearing before Judge Lampe, Chancellor of the Circuit Court of Jefferson County, in September, 1952. The Constitutional question was also raised by petitioners by Brief and arguments on appeal by respondents to the Kentucky Court of Appeals. The Constitutional question was also raised by petitioners in their Petition for Rehearing to the Kentucky Court of Appeals (R. 57).

Further, it unmistakably appears from the opinion of the Circuit Court in 1950, with Judge Miller writing the opinion; from the opinion of the Circuit Court in 1952, with Judge Lampe writing the opinion; and the opinion of the Kentucky Court of Appeals in December, 1952, with Judge Stewart writing the opinion; that the Federal question was assumed to be at issue and was actually decided by each of

those Courts, and was necessary to their judgments and decrees. *Haire* v. *Rice,* 204 U. S. 291, 27 S. Ct. 281. See discussion of the various Kentucky opinions in this Petition under the caption headed "Opinions Below" and the caption headed "Reasons Relied on for Allowance of Writ of Certiorari."

Reasons Relied On for Allowance of Writ of Certiorari

This cause presents an important question and interpretation of Federal Constitutional Law, which has not been heretofore directly determined by this Court and should now be determined.

The matters and issues involved are of general public interest and come within the class of cases indicated by the rules to be appropriate for review.

This case presents matters of substantial interest to all organized labor and to all persons and classes of persons dealing with organized labor. The case also presents questions of substantial and general interest to all State Courts before which cases involving the right to picket peacefully are brought, since it involves the interpretation of this Court's holdings in the three opinions rendered by this Court on May 3, 1950; namely, *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 309* v. *Hanke,* 339 U. S. 407, 70 S. Ct. 773; *Building Service Employees International Union* v. *Gazzam,* 339 U. S. 532, 70 S. Ct. 784; and *Hughes* v. *Superior Court,* 339 U. S. 460, 70 S. Ct. 718.

The Court of Appeals of Kentucky, just as the Courts of a number of other states, is distorting the holdings and decisions of this Court in those cases in such a manner as to arrive at results which we believe were never intended by this Court. That the Court of Appeals of Kentucky has so distorted those three cases is clear in the opinion written by the Court,

The Circuit Court stated in its opinion that the issue in the case was as follows:

> "Therefore, the real question involved in this case is: Can ALL picketing be enjoined even though peaceful and orderly on the sole ground that the union doing the picketing represents no employees of the place of business proposed to be picketed? Fundamentally this is a question of the constitutional right of freedom of speech guaranteed both by the Federal and the State Constitutions." (R. 32)

The Court further stated: (R. 33)

> "Does the fact that a labor union has no member in the employ of a particular business establishment but, instead, is attempting to solicit membership from without, mean, as a matter of law, that there is no such labor dispute as to permit it to disseminate information concerning the alleged existence of said dispute?"

The Court then referred to *Hotel & Restaurant Employees Union No. 181, et al.* v. *Miller,* 272 Ky, 166, 114 S. W. (2d) 501, decided in 1938, in which the Court of Appeals of Kentucky had held that peaceful picketing is not lawful when the picketing union represents no employees at the picketed establishment. The Court then pointed, however, to *Blanford, et al.* v. *Press Publishing Company,* 286 Ky. 657, 151 S. W. (2d) 440, which case was decided after the holding of this Court in *A. F. L.* v. *Swing,* 312 U. S. 321, 61 Sup. Ct. 568. The Court pointed out that the *Blanford* case changed the law of Kentucky in regard to peaceful picketing in the absence of an employer-employee relationship and quoted from that case as follows:

> "Hence, members of any labor union, so long as they refrain from acts of violence, may not be enjoined *from picketing the premises of any person* against whom the union has a grievance, or from con-

ducting a boycott against his business, notwithstanding the consequences to him, his accord with his own employees, or his inability to grant the demands made upon him by the union.

"Since the appellants are members of bona fide labor unions, and, *in attempting to compel the unionization of appellee a printing establishment,* did not resort to acts of violence, it is wholly immaterial that by advertisements and personal interviews in which the facts were stated and consequences intimated, they induced many of the appellee's patrons to withhold their patronage. Appellants were exercising rights guaranteed to them by the Constitution, as construed by the Supreme Court, and lesser courts are powerless to afford appellee any relief." (Emphasis supplied.)

The Court then states:

"The Blanford case would appear to be determinative of the question involved in this case. . . . Plaintiff further urges that the Supreme Court has departed from the Swing case, and therefore, our Court of Appeals would now return to the doctrine announced in the Hotel vs. Miller case, supra, rather than follow the Blanford case. . . . As to counsel's contention that the Supreme Court has departed from the rule in the Swing case, they rely on the cases of Hughes vs. Superior Court, 339 U. S. 460, 94 L. Ed. 985; Building Service Employees Union vs. Gazzam, 339 U. S. 532, 94 L. Ed. 1045; and International Brotherhood of Teamsters, etc. vs. Hanke, 339 U. S. 470, 94 L. Ed. 1045, all decided in 1950." (R. 35)

The Court rejected the contention of respondent's counsel that the said three Supreme Court cases had departed from the rule in the *Swing* case, stating as follows:

"It would appear to the Court that, if our Court of Appeals has announced any public policy relative to the limits within which peaceful picketing can be con-

> ducted, that policy is one which permits picketing of an establishment of which a union does not have a member as an employee. Thus, the Court must reject the contention of counsel for plaintiff that the Hughes case, the Gazzam case and the Hanke case have had the effect of changing the rule in Kentucky followed in the Blandford case" (R. 40).

The Court concluded, therefore, that the right to picket in this cause was constitutionally protected and the Circuit Court of Jefferson County refused to enjoin all peaceful picketing. It ordered that the temporary injunction rendered in June, 1950, which had enjoined all picketing, be modified "so as to permit peaceful, non-mass picketing with a reasonable number of pickets, and will further be modified to permit the dissemination of information by those pickets and otherwise, so long as that information is truthful and not slanderous or libelous" (R. 42).

The respondent again urged in the Court of Appeals that the three decisions rendered by the Supreme Court of the United States referred to above altered the law concerning the right to picket peacefully; reversed the *Swing* doctrine, and reinstated the Kentucky decision in *Hotel & Restaurant Employees* v. *Miller*, 272 Ky. 166, 114 S. W. (2d) 501.

The Court of Appeals of Kentucky, in reversing the Circuit Court, also reviewed the holding of this Court in the *Swing* case, and stated: "The Swing case encroached upon and virtually changed the common law of several states" (R. 52).

The Court then referred to the holding of this Court in *Hughes* v. *Superior Court of California*, 339 U. S. 460, and stated:

> "By the latter part of 1949 the Supreme Court had arrived at a realistic interpretation of picketing. . . . (R. 53).

The Court then referred to *Building Service Employees v. Gazzam,* 339 U. S. 532, and in its opinion endeavored to bring itself within the facts of that case. It referred to a statute of the Commonwealth of Kentucky, namely, Ky. Rev. Stat. 336.130 (Chapter 105 of the 1940 Act of the General Assembly) and quoted from said Act as follows (R. 54):

> "(1) Employees may, free from restraint or coercion by the employers or their agents, associate collectively for self-organization and designate collectively representatives of their own choosing to negotiate the terms and conditions of their employment to effectively promote their own rights and general welfare. Employes, collectively and individually, may strike, engage in peaceful picketing, and assemble collectively for peaceful purposes.
>
> "(2) Neither employers or their agents nor employes or associations, organizations or groups of employes shall engage or be permitted to engage in unfair or illegal acts or practices or resort to violence, intimidation, threats or coercion."

The Court concluded that the proposed 1952 picketing "would, if allowed, result in coercing Blue Boar to resort to compulsion to force its employees to join the union in violation of KRS 336.130" (R. 56).

In the course of arriving at that conclusion, however, the Court adopted new theories and doctrines which completely subvert the meaning of the decisions of the United States Supreme Court, and further, the Kentucky Court's conclusion places picketing for recognition in the category of forbidden picketing.

The record of the May, 1952, and June, 1952, occurrences makes it clear that the purpose of the picketing which was enjoined would have been to protest discriminatory discharges of union members and refusal by the Company to bargain with the Union on behalf of the employees represented by the Union.

In support of its injunction, Kentucky's Court of Appeals treated the evidence before it as follows:

1. It completely ignored the evidence at the final hearing in October, 1952, which was undisputed, that the Union was only requesting the employer to bargain with it for the employers which it represented; that there were letters to that effect, and that those letters were the only contact between the employer and the Union for over two years.

2. It went back to the 1950 record and found some evidence that more than two years earlier the Union had requested the employer to recognize it as the collective bargaining representative of all the employees of the employer within the Union's jurisdiction (in conjunction with a collateral request for an election among Blue Boar's employees).

By basing its injunction against all peaceful picketing on facts and controversies no longer in existence at the time of the final hearing, the Court of Appeals violated a fundamental rule of equity long recognized and enforced by this Court, namely, that an injunction against peaceful picketing must be based on the facts existing at the time of the granting of the injunction, and, on request, should be vacated when the facts no longer exist.

The Kentucky Court of Appeals could not, even though it ignored the 1952 facts and mis-applied the 1950 facts, come within the allowable limits of State public policy, as set forth in *Building Service Employees* v. *Gazzam*, 339 U. S. 532. It could not do this, since there was still not a scintilla of evidence even in the 1950 record that the purpose of the Union was to coerce the employer to coerce his employees into joining the Union. In fact, the 1950 opinion of Judge Miller, Chancellor of the Circuit Court of Jefferson County, made it clear that the only question, based on the 1950 evidence, was the following:

> "The whole question to be determined here is—May a Court of equity enjoin peaceful picketing where there is no dispute between employer and employee and where the picketing is being done by a union who does not represent any employee?" (R. 12).

In order to achieve the end result of enjoining all picketing for whatever purpose, and yet come within the *Gazzam* doctrine, the Court of Appeals of Kentucky evolved a new doctrine. It is this new doctrine which constitutes the most serious aspect of this case, since it results in "an unwarranted encroachment upon rights protected from State abridgment by the Fourteenth Amendment," *Building Service Employees* v. *Gazzam,* 339 U. S. 532, 535. That doctrine is as follows:

> *Picketing for recognition constitutes coercion of an employer to coerce his employees into joining the union.*

The reasoning used by the Court in arriving at that result is set forth in the last five sentences of the third last paragraph of the opinion. (R. 56) Those sentences are the heart of the opinion, and they are set forth separately with our comments opposite each sentence below.

The Court's Opinion	*Comment*
1. "There is an abundance of proof to establish the fact that pressure has been exercised on Blue Boar to compel it to sign a contract with the union and recognize the union as the sole bargaining agent for all its 270 employees."	1. There is no evidence whatsoever to establish that fact in the May, 1952, and June, 1952, occurrences. On the contrary, Stipulation Exhibit A (R.23) clearly states and the Chancellor of the Circuit Court found that the Union was attempting to bargain with the Company only for the employees of the

The Court's Opinion	*Comment*
	Company whom it represented. That letter specifically stated that: "We are not and we will not request that you bargain with us for any employees that we do not represent, or that any effort be made on your behalf to ask, urge, coerce or demand that any other employees other than those we represent join this Union." The only evidence in the 1950 hearing on this point was to the effect that the Union was endeavoring to persuade the Company to recognize it as the collective bargaining representative of the Company's employees, in conjunction with a further request for an election among the Company's employees.
2. "Had Blue Boar entered into this contract and lived up to its terms, its employees would have been coerced by it to join the union, regardless of their wishes."	2. We have no idea what the Court is referring to as "this contract." No contract was ever presented to the Company, nor was one ever introduced into evidence.
3. "Had Blue Boar recognized this union as the exclusive bargaining agent of its employees, the latter would have been forced to deal solely with this particular union."	3. Even if Blue Boar had recognized the union as the exclusive bargaining agent of its employees, that does not of itself mean that those employees could not deal with or join any other union or join no union if they so de-

The Court's Opinion

4. "It follows that the employees would have had no free choice as to whether or not they wished to organize or what union they desired as their bargaining representative."

Comment

sired. Apparently, what the Court means is that if a particular union is the sole collective bargaining representative, then the employees of the Company, as a practical matter in order to obtain the most benefits for themselves, would deal with the recognized union. That is a far cry, however, from the coercing of employees to join a particular union.

4. The Court bases its conclusion on the preceding sentence, which is in turn based on the false assumption that if there is any recognized union, all employees would of necessity have to join it. Merely because one union is recognized does not prevent the employees from joining another union or refusing to join any union. Minority unions have existed for many years in the railroad industry and in many other industries. These sometimes displaced the majority unions and became the majority unions themselves. If the Court's conclusion were correct, then no employer could ever *recognize* a union unless that union represented 100% of his employees.

The Court's Opinion	*Comment*
5. "We therefore conclude that the picketing in this case would, if allowed, result in coercing Blue Boar to resort to compulsion to force its employees to join the union, in violation of KRS 336. 130."	5. This conclusion is based on false premises buttressed by false logic and therefore must of necessity fail.

We submit that the course of the Court's logic gives the appearance that a conclusion was first arrived at, and a tortuous, syllogistic series of steps was then constructed to arrive at that conclusion. We submit that the Kentucky Court of Appeals has attempted an unwarranted extension of the doctrine of this Supreme Court, enunciated in the *Gazzam* case, which has resulted in an unwarranted encroachment upon rights protected from State abridgment by the Fourteenth Amendment.

If this Court allows such a State public policy to stand, then we submit that all picketing of establishments engaged in intra-state commerce, for recognition purposes, may be forbidden by any State Court or State legislature. Thus, even if 90% of the employees of a particular establishment were members of a union and an employer refused to recognize the union as the exclusive collective bargaining representative, under Kentucky's doctrine the union could be enjoined from picketing for recognition. It follows then, that Kentucky has established the policy that in any case in which an employer refuses to recognize a particular union and in which 100% of the employees do not belong to the union, picketing will not be allowed,—a strike for recognition would similarly be illegal.

Further, we ask this Court, if such is the public policy of Kentucky, what validity can there be to any labor contract where an employer voluntarily recognizes a union as the sole collective bargaining representatives of his employees, if any one or more of the employees do not wish to be represented by the recognized union?

Just how far Kentucky has gone can be ascertained from a reading of *General Drivers, Warehousemen and Helpers, Local Union No. 89* v. *American Tobacco Company, Inc.*, — Ky. —, 32 LRRM 2259 (June 2, 1953).

Kentucky has construed, improperly, we submit, the decision of this Court in *Building Service Employees* v. *Gazzam*, as giving it a free hand to enjoin all picketing whenever it desires by setting up a State public policy to fit the particular case and then holding that the particular picketing is violating that State public policy. A number of other courts of last resort have also interpreted that decision, together with those of the *Hanke* and *Hughes* cases, as being complete reversals of this Supreme Court's decisions on picketing from *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468, to *Cafeteria Employees Union* v. *Angelos*, 320 U. S. 293. They have interpreted the three decisions of May, 1950, as a removal from peaceful picketing of Constitutional safeguards and as permissive beacons to enjoin all picketing under any circumstance, by simply stating that the particular picketing is contrary to the public policy of the State.

The instant cause is a flagrant example of a State court endeavoring to use that reasoning to trespass beyond the Constitutional boundaries and protective barriers set up by this Court.

For all the foregoing reasons, it is respectfully submitted that this Petition should be granted.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 175

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, LOCAL NO. 181, 1412 WASHINGTON BLDG.; ELGIN G. BARTLETT, 1412 WASHINGTON BLDG.; EDMUND F. GRIMES, 1401 WASHINGTON BLDG.; MATTHEW W. DAVIS, 1301 WASHINGTON BLDG.; SAM EZELLE, 410 WASHINGTON BLDG.; EDWARD H. WEYLER, 1401 WASHINGTON BLDG.; ARTH. J. POTTER, 1412 WASHINGTON BLDG.; FRED B. WOLF, 410 WASHINGTON BLDG.; MRS. SAM EZELLE, 1312 RAMMERS AVENUE; MRS. HELEN MORGAN, MRS. AILENE B. CAMPBELL,

Petitioners,

vs.

BLUE BOAR CAFETERIA COMPANY, INCORPORATED,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions Below

Opinions below have been referred to in the Petition for Writ of Certiorari under this same caption.

Jurisdiction

The statement as to jurisdiction has been set forth in the Petition for Writ of Certiorari under this same caption.

Statement of the Case

The facts have been set forth in the Petition for Writ of Certiorari under the heading "Summary Statement."

Specifications of Error

1. The Kentucky Court of Appeals erred in reversing the decision of the Jefferson County Circuit Court refusing to enjoin all picketing and in ordering that an order be entered enjoining all picketing.

2. The Kentucky Court of Appeals erred in dismissing appellees' Petition for Rehearing.

Argument

This Court has held on numerous occasions that peaceful picketing is protected by the First and Fourteenth Amendments to the Constitution of the United States and that picketing "is a natural and appropriate means of conveying information on matters of public concern. . . . Publicizing the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth, or by banner, must now be regarded as within that liberty of communication which is secured to every person by the Fourteenth Amendment against abridgment by a State." *Carlson v. California,* 310 U. S. 106, 112, 113.

Earlier this Court had stated, in *Senn* v. *Tile Layers Union,* 301 U. S. 468, that "members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech

is guaranteed by the Federal Constitution." (At Page 478)

In *A. F. L.* v. *Swing,* 312 U. S. 321, this Court squarely held that the powers of the State courts to limit the exercise of picketing was confined by the United States Constitution, and in particular the First and Fourteenth Amendments thereto. This Court in that case stated:

> "The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state." (At p. 326)

In 1942 this Court had before it an injunction which had been sustained by the New York Court of Appeals in *Wohl* v. *Bakery and Pastry Drivers Union,* 284 N. Y. 784. The dispute concerned a request by the Union and a refusal by the Company to hire an unemployed union member as a relief worker for one day each week. In order to bring pressure upon the Company, the Union picketed the manufacturing bakers from whom the peddlers bought products and also picketed the retail stores to which they sold them. In *Bakery and Pastry Drivers Local Union* v. *Wohl,* 315 U. S. 769, this Court reversed the decision of the New York Court of Appeals. Mr. Justice Jackson, writing for the majority, stated:

> "One need not be in a 'labor dispute' as defined by state law to have the right under the Fourteenth Amendment to express a grievance in a labor matter by publication, unattended by violence, coercion or conduct otherwise unlawful or oppressive." (At p. 774)

See also *Cafeteria Employees Union* v. *Angelos,* 320 U. S. 293.

This Court has, in specific circumstances, placed certain limitations on picketing. Thus, when picketing is en-

meshed in a pattern of violence so continued and flagrant that the picketing becomes coercion *per se,* all picketing may be enjoined. *Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U. S. 287. In the *Meadowmoor* case, however, the Court reaffirmed the Constitutional status of picketing, stating at Page 296:

> "We have already adverted to the generous scope that must be given to the guarantee of free speech. Especially is this attitude to be observed where, as in a labor controversy, the feelings of even the most detached minds may become engaged and a show of violence may make still further demands on calm judgment. It is therefore relevant to remind that the power to deny what otherwise would be lawful picketing derives from the power of the states to prevent future coercion. Right to free speech in the future cannot be forfeited because of dissociated acts of past violence, nor may a state enjoin peaceful picketing because it may provoke violence in others. *Near* v. *Minnesota,* 283 U. S. 697, 721, 722, 75 L.E.D. 1357, 1870, 1371, 51 S. Ct. 625; *Cantwell* v. *Connecticut,* 310 U. S. 296, 84 L. E. 1213, 60 S. St. 900, 128 A.L.R. 1352.
>
> "(3) The injunction which we sustain is permanent only for the temporary period for which it may last. It is justified only by the volence that induced it and only so long as it counteracts a continuing intimidation."

In *Carpenters & Joiners Union* v. *Ritter's Cafe,* 315 U. S. 722, this Court held that picketing would not be allowed where it was not conducted within the area of the dispute. Once again, however, the Court reaffirmed the Constitutional status of picketing.

In *Giboney* v. *Empire Storage & Ice Co.,* 336 U. S. 49, this Court held that picketing could be enjoined when it was conducted for the sole purpose of requiring an employer to violate a specific State statute.

In each of these cases, however, the status of picketing as a Constitutionally protected activity was reaffirmed.

The circumstances in which a State could enjoin picketing were rigidly and specifically limited to the particular situations of the *Meadowmoor* case, where picketing was enmeshed in violence; the *Ritter* case, in which the picketing was conducted at an establishment having no connection with the industrial dispute; and the *Giboney* case, in which the picketing was conducted for the sole purpose of requiring an employer to violate a specific State statute.

By May 8, 1950, therefore, the law in regard to picketing was a fairly well settled matter and the State courts assiduously followed the rules set down by this Court in regard to picketing. On May 8, 1950, this Court rendered three decisions, namely: *Hughes* v. *Superior Court,* 339 U. S. 460; *International Brotherhood of Teamsters Local 309* v. *Hanke,* 339 U. S. 470 and *Building Service Employees* v. *Gazzam,* 339 U. S. 532. It is submitted that each of those three cases was within the specific principle set down by this Court in *Giboney* v. *Empire Storage & Ice Co.,* 336 U. S. 49, and that the Court did not intend in those three cases to change the rules which it previously had set down in regard to the Constitutional protection of picketing. Thus, in each of the three cases the Court referred to *A.F.L.* v. *Swing,* 312 U. S. 321, and reaffirmed that decision. The Court also reaffirmed its other previous decisions in regard to the Constitutional protection of picketing. Further, in the *Hughes* case, it was specifically pointed out "that the injunction is limited to prohibiting picketing for a specific unlawful purpose," and Mr. Justice Frankfurter, speaking for the majority, pointed out that "the injunction here was drawn to meet what California termed the evil of picketing to bring about proportional hiring."

In the *Gazzam* case, Mr. Justice Minton, speaking for the majority, pointed out that "an injunction was issued

in narrow terms enjoining petitioners 'from endeavoring to compel plaintiff to coerce his employees to join the defendant union or to designate defendant union as their representative for collective bargaining, by picketing the hotel premises of plaintiff . . .'" (At p. 533) It was further pointed out in that case:

> "The Washington statute has not been construed by the Washington courts in this case to prohibit picketing of workers by other workers. The construction of the statute which we are reviewing only prohibits coercion of workers by employers. We cannot agree with petitioners' reading of this injunction that 'whatever types of picketing were to be carried out by the union would be in violation of the decree.' Respondent does not contend that picketing per se has been enjoined but only that picketing which has as its purpose violation of the policy of the State. There is no contention that picketing directed at employees for organization purposes would be violative of that policy. The degree does not have that effect." (At p. 539)

There was certain language used in *Hughes* v. *Superior Court of California*, 339 U. S. 460, which has been seized upon by a number of writers and State courts for the purpose of contending that this Court has reversed its previous decisions in regard to picketing. That language is as follows:

> "Picketing is not beyond the control of the State if the manner in which picketing is conducted or the purpose which it seeks to effectuate gives ground for its disallowance. (At p. 465)
>
> • • • • • • •
>
> "The policy of a State may rely for the common good on the free play of conflicting interests and leave conduct unregulated. Contrariwise, a State may deem it wiser policy to regulate. Regulation may take the

> form of legislation, e. g., restraint of trade statutes, or be left to the ad hoc judicial process, e. g., common law mode of dealing with restraints of trade. Either method may outlaw an end not in the public interest or merely address itself to the obvious means toward such end. The form the regulation should take and its scope are surely matters of policy and, as such, within a State's choice." (At p. 468)

A number of State courts have reversed their previous rulings in regard to picketing and have based such reversals on the particular language quoted above, holding as the Kentucky Court of Appeals has held, that "by the latter part of 1949, the Supreme Court had arrived at a realistic interpretation of picketing . . ." (R. 53). Thus, in the instant case an examination of the opinion of the Kentucky Court of Appeals indicates its belief that the case of *Blanford* v. *Press Publishing Co.*, 286 Ky. 657, 151 S. W. (2d) 440, which case followed the decision of this Court in *A.F.L.* v. *Swing*, 312 U. S. 321, is now nullified by the three said United States Supreme Court decisions of May, 1950, and that the Court can now return to its rules in regard to picketing existing prior to the *Swing* case. The Court further indicates in its opinion, in quoting from Professor Sylvester Petro, that it considers picketing for organizational purposes as treated in the same manner as picketing for immediate recognition. (R. 55) The Court then proceeds to prohibit picketing for recognition. The Supreme Court of the United States, however, has never held that picketing for organizational purposes or to obtain recognition is picketing for a purpose which can be held by a State to be subject to injunction. Enjoining picketing for such a purpose is a restraint of picketing which "is an unwarranted encroachment upon rights protected from State abridgment by the Fourteenth Amendment." *Building Service Employees* v. *Gazzam*, 339 U. S. 523, 535.

The Court, in *Gazzam, supra,* states: "There is no contention that picketing directed at employees for *organizational purposes* would be violative of that policy. The decree does not have that effect." (At Page 539) (Emphasis ours)

II

The Court of Appeals of Kentucky in this cause has equated picketing for recognition with picketing for the purpose of coercing an employer to coerce his employees into joining a union. The Court has attempted to base its decision upon rulings of this Court. In doing so, it is following the trend that several state courts are now following and have been following since the decisions of this Court in *Hughes, Hanke* and *Gazzam* cases.

The opinions of this Court in those said three cases have been interpreted and are so interpreted in the instant cause in a way which we believe this Court never intended. The view taken by a number of courts is summarized by Osmond K. Fraenkel in University of Pennsylvania Law Review, 1 to 12 (October, 1950), at page 11. The writer states that in view of those decisions of the Supreme Court of the United States, the following principles may be drawn:

> "1. Indiscriminate bans on peaceful picketing whether by statute or injunction violate the Constitution.
>
> "2. Peaceful picketing may be enjoined when it is part of an activity which the state, whether by its legislature or its highest court, has declared contrary to public policy—subject, of course, to the proviso that such a declaration be itself constitutional. It is thus in this area that the discussion is likely to take place in the future since state courts will be sufficiently astute to take the hint contained in Mr. Justice Frankfurter's opinion and hereafter to de-

clare as illegal any objective toward which the picketing which they seek to enjoin is directed.

"3. Between these extremes lies an area about which no safe prediction can be made—that is, if the state courts, failing to take the hint, let such an area remain. There the validity of a ban on peaceful picketing will depend on whether the majority of the Supreme Court considers that the state has confined the picketing to an 'unrealistic' area.

"We have traveled a long way. For a time it seemed as though peaceful picketing were going to receive real constitutional protection. Now it looks as though state courts, by the simple device of declaring union objectives contrary to public policy, can ban peaceful picketing in almost all situations where there is room for difference of opinion as to those objectives."

The above is quoted in *Hagen* v. *Culinary Workers Alliance* —— Wyo. ——, 246 P. (2d) 778 (Wyo. Supreme Court, July 22, 1952).

Such misinterpretation has resulted in injunctions against all picketing in state after state. We refer the Court to the following states and cases which have occurred since the said three decisions of this Court on May 8, 1950:

WYOMING

Hagan v. *Culinary Workers Alliance* —— Wyo. ——, 246 p. (2d) 778 (Wyo. Supreme Court, July 22, 1952)

ALABAMA

Klibanoff v. *Retail Clerks Union* —— Ala. ——, 64 So. (2d) 393 (Ala. Supreme Court, March 13, 1953)

MISSOURI

Katz Drug Company v. *Kavner et al.* —— Mo. ——, 249 S. W. (2d) 166 (Mo. Supreme Court, May 12, 1952)

TEXAS

General Drivers et al. v. *Dallas County Construction Employers Association et al.* —— Tex. ——, 246 S. W. (2d) 677 (Texas Court of Civil Appeals, December 14, 1951: on rehearing January 25, 1952; on second rehearing February 22, 1952)

NEW JERSEY

Outdoor Sports Corporation v. *A.F.L.*, 6 N. J. 217. 78 A. (2d) 69 (N. J. Supreme Court, January 15, 1951)

WASHINGTON

Morris v. *Local Union 494 et al.*, 39 Wash. (2d) 33, 234 P. (2d) 543 (Wash. Supreme Court, July 27, 1951)

CALIFORNIA

Voeltz v. *Bakery and Confectionery Workers et al.* —— Cal. ——, 254 P. (2d) 553 (Cal. Supreme Court, March 10, 1953; Rehearing denied April 2, 1953)

ARKANSAS

Self v. *Taylor*, 217 Ark. 953, 235 S. W. (2d) 45 (Supreme Court of Arkansas, December 11, 1950)

OHIO

W. E. Anderson Sons Company v. *Teamsters Union*, 156 O. S. 541, 104 N. E. (2d) 22 (Supreme Court of Ohio, February 13, 1952)

OHIO

Bean v. *Local Union No. 698 et al.*, —— O. A. ——, (No. 4368, Ohio Court of Appeals, Ninth Judicial Circuit, July 1, 1953)

INDIANA

Bartenders Union v. *Clark Restaurants*, 122 Ind. App. Ct. Rep. ——, 102 N. E. (2d) 220; Petition to Transfer denied, 230 Ind. 372, 103 N. E. (2d) 686. (Feb. 18, 1952)

NEW YORK

Wilson v. *Hacker,* 101 N. Y. S. (2d) 461. (Nov. 13, 1950)

The attitude of these courts is best expressed in *Wilson* v. *Hacker,* supra, as follows by Judge Halpern:

> "Prior to the decisions of the U. S. Supreme Court handed down during the 1949-1950 term, it would have been necessary to consider the impact of the First and Fourteenth Amendments of the U. S. Constitution upon the power of the court to enjoin peaceful picketing. The earlier decisions in the period from 1940 to 1948 had identified peaceful picketing with freedom of speech and had severely limited the power of the state legislatures and state courts to forbid such picketing. The authority of those decisions has been impaired, if they have not been wholly overruled by the recent decisions."

Judge Stevens in *Bean* v. *Local Union No. 698 et al, supra,* states as follows:

> "More recently, however, the Supreme Court of the United States appears to have experienced a change of mind on the question of the paramount sanctity of the constitutional guaranty of the right of free speech, so far as unions are concerned."

Judge Stevens refers to the *Hughes* case and the *Hanke* case and finds that those cases require the Court to reverse its previous decisions in which the Court had refused to enjoin all picketing. Judge Stevens states as follows:

> "The above decisions make it necessary to overrule and abandon the position previously taken by this court in the Smith and Gerhart and Iacomini cases, supra."

III

The decision of the Court of Appeals of Kentucky is based on two findings as follows: (R. 56)

(1) "There is an abundance of proof to establish the fact that pressure has been exerted on Blue Boar to com-

pel it to sign a contract with the union and recognize the union as the sole bargaining agent for all its 270 employees."

(2) "Had Blue Boar entered into this contract and lived up to its terms, its employees would have been coerced by it to join the union, regardless of their wishes."

It is the contention of petitioner that there is no evidence in the record as to the occurrences in May and June, 1952, on which the Court could reasonably base its decision that pressure had been exerted on Blue Boar to compel it to recognize the Union as the sole bargaining agent for all its 270 employees. It is also the contention of petitioner that there is no evidence in the record on which the Court could reasonably base its decision that a purpose of the picketing was to put pressure on Blue Boar to enter into a particular contract which would have required it to coerce its employees to join the union regardless of their wishes. No contract was ever presented to the Company, nor was any particular contract ever proposed to the Company or discussed with the Company.

Since the holding of the Court in enjoining all picketing is based on those two findings, we submit that this Court should examine the record to determine whether the record in the case justifies the findings made by the Court of Appeals of Kentucky. It is submitted that an examination of the record will reveal that in 1952 there was a labor dispute between the parties based on the following:

(1) A claim by the union that five employees had been discharged for union membership and union activity.

(2) A request by the union that the company negotiate a collective bargaining agreement with it covering only those people whom it represented, and the refusal by the company to comply with that request.

This Court has previously held, in *Local Union No. 10, United Association of Journeymen Plumbers, et al* v. *Graham, et al,* 345 U. S. 192 (March 16, 1953, with Mr. Justice Burton, speaking for the majority, that "in a case of this kind we are justified in searching the record to determine whether the crucial finding by the State courts had a reasonable basis in the evidence." (At Page 197). The court further stated in the footnote to said sentence as follows: ". . . it is of prime importance that no Constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. That is why this Court has the ultimate power to search the records in the State courts where a claim of Constitutionality is effectively made."

It is respectfully submitted that an examination of the record and the actions of the Kentucky Court of Appeals in this matter will reveal that this is a cause in which the Court should exercise its judicial powers and grant the Petition for Writ of Certiorari.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

Docket No. 175.

FILED

JUN 21 1953

HAROLD B. WILLEY, Clerk

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, LOCAL No. 191, ELLIS G. BARNETT, EUGENE F. GRIGGS, MATTHEW W. DAVIS, SAM EISELE, EDWARD H. WEILER, ANNE J. PETERS, FRED R. WOLF, MRS. SAM EISELE, MRS. HELEN MORGAN, MRS. ALBERT B. CAMPBELL,

Petitioners,

vs.

BLUE BOAR CAFETERIAS COMPANY, INC.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITIONERS' PRAYER FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY.

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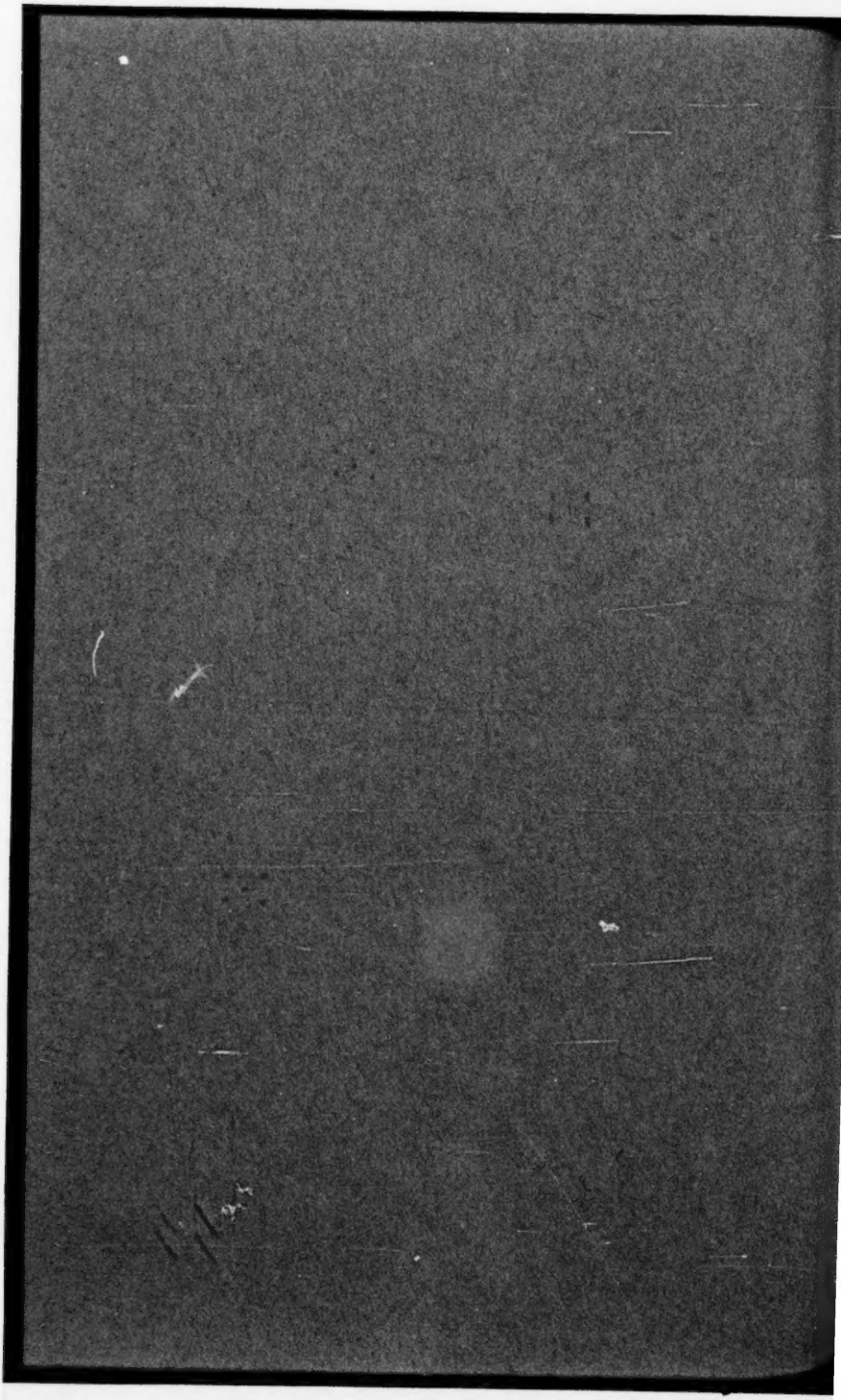

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

Docket No. 175.

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, LOCAL No. 181, ELGIN G. BARTLETT, EDMUND F. GRIMES, MATTHEW W. DAVIS, SAM EZELLE, EDWARD H. WEYLER, ARTH J. POTTER, FRED B. WOLF, MRS. SAM EZELLE, MRS. HELEN MORGAN, MRS. AILEEN B. CAMPBELL,
Petitioners,

VS.

BLUE BOAR CAFETERIA COMPANY, INC.,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITIONERS' PRAYER FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY.

STATEMENT.

In the so called "summary statement" of petitioners, there are some glaring inaccuracies and misstatements. These require clarification and correction.

On page 3 of the petition, the statement is made that Blue Boar refused to permit the Commissioner of Industrial Relations to conduct an election. Peti-

tioners neglect to point out that less than two weeks prior to this refusal, namely on October 7, 1949, Blue Boar had offered to permit the Commissioner of Industrial Relations to conduct an election among its employees and the Union refused (R. 239-241). The Court of Appeals noted this in its opinion (254 S. W. 2d 335, 336; R. 49).

Petitioners also make the statement that the Commissioner of Industrial Relations had satisfied himself that the union did represent "a substantial number of employees of the company" (Pet. 3). This fact has never been proven. Just the contrary has been shown at every hearing. In July, 1950, the Chancellor found as a fact,

> "From the proof taken and the affidavits filed, it is conclusively shown that no employee of the plaintiff is a member of the defendant union * * *" (R. 12).

The petition, page 8, contains a statement,

> "Further, in the period from May 30 to June 2, 1952, five *of the seventeen employees who were members of the Union* were discharged by the company" (R. 250, 252, 253, 254, 255).

The emphasized portion of that statement without explanation would appear an attempt to mislead this Court into believing there were seventeen employees members of the Union. There is no support in the Record for this. The only time that the word "seventeen" was ever mentioned in the testimony was by the Union's business agent, Harrod, on direct examination when he stated (R. 245):

> "We called a meeting down town and there were approximately seventeen people attended that meeting."

At this hearing in September, 1952, the Chancellor found that only five of the employees of Blue Boar were ever proven to have signed Union authorization cards. He points out that the Union claims it represented others, but it never proved that fact (R. 43). The Chancellor stated in his finding,

> "Counsel for the defendant insisted that other employees of the plaintiff had signed authorization cards and offered to exhibit such cards to the presiding Judge, but not to opposing counsel or parties. Whereupon the court informed the counsel that he didn't wish to see the cards unless they were made a part of the record. * * * *It is to be noted that this was a claim of counsel and that the defendant did not introduce any signed authorization cards other than the five produced in evidence."* (Emphasis supplied.)

On page 4 of the petition, the claim is made that the members which the Union alleged to have signed up, "steadily dwindled as they became discouraged or were fired or quit their employment with the company." Reference is given to the Record, pages 163 and 12. We have diligently searched the entire record and can find no foundation at all for such a statement. Certainly the referenced pages do not support such a statement.

Again on page 4 of the petition, the claim is made that the Chancellor in 1950, refused to give weight to the fact that the Union had represented a substantial

number of the employees at the inception of the controversy. That is absolutely incorrect. The Union never attempted to prove, in 1950, that it represented any employee of Blue Boar. As a matter of fact, it offered absolutely no proof at that time and the record clearly shows this. The Union offered only two affidavits and they appear in the record. This is duly noted in the order of the Jefferson Circuit Court, entered on July 13, 1950 (R. 14).

Petitioners, in discussing the discharges and termination of the employees in 1952, make this statement on page 9 of the petition:

> "That such discharges occurred within a short time after an anti-union and pro-company employee learned of the Union activity" (R. 268, 274, 273, 283).

This statement is utterly false and untrue. The employee referred to as "anti-union and pro-company" was Laura Brown, a negro bus girl. After the Union by its testimony tried to insinuate that Laura Brown was an informant, counsel for Blue Boar called her to the stand in rebuttal. She testified that the first she ever learned of "Union activity" was Saturday after this Friday hearing when she read the newspaper and discussed the matter with company counsel (R. 200, 201, 205).

The statement contained in this paragraph of the petition to the effect that these discharges or terminations did occur within a short time of each other is true. But Blue Boar had prepared and introduced in evi-

dence, an exhibit showing the employee terminations during the period March 1 through August 15, 1952. This was Plaintiff's Exhibit No. 6 and appears in the Record at pages 232-235. In addition to that, there was introduced in evidence, Plaintiff's Exhibit No. 7 which constituted a recapitulation of the terminations between May 1 and August 15, 1952. This appears on pages 236 and 237 of the Record. A glance at these uncontroverted exhibits will clearly indicate that there were no more separations during the two-week period May 25-June 8, than in any other period covered by the exhibit. During that time there were fourteen separations of which six were voluntary and eight involuntary.

Again on page 12 of the petition, a completely erroneous statement is made.

> "The injunction ordered by the Court of Appeals enjoined all picketing of any sort whatsoever. It did not, as in the case of *Building Service Employees* v. *Gazzam,* 339 U. S. 532, enjoin picketing for a specific unlawful purpose. Nor did the Kentucky Court distinguish between legitimate picketing and abusive picketing. Instead it broadly enjoined all picketing, peaceful or otherwise, for a legitimate purpose or for an illegitimate purpose."

It is hard to conceive a more distorted picture of the opinion of Judge Stewart of the Court of Appeals than this bald statement made by petitioners. Throughout the decision, the Court was extremely careful to point out that the injunction granted was strictly limited to the factual situation "in this case." As a matter of fact, in the opinion (254 S. W. 2d 335, 336,

338, 339; R. 48, 53, 55, 56) this language is repeated: "Under the facts of this case"; again "applicable to the facts of this case"; "We now come to the question of whether picketing in this case has been and is now illegal because its purpose is to coerce Blue Boar to violate the law of this state as set forth in KRS 336.130"; "but, when we set it up against the factual background of this case"; and in the concluding paragraph this language is found:

> "We therefore conclude that the picketing in this case would, if allowed, result in coercing Blue Boar to resort to compulsion to force its employees to join the union in violation of KRS 336.130."

It is thus apparent that the Court of Appeals has very narrowly limited its decision to the facts of this case and has found that under these facts the picketing was for an unlawful purpose and hence enjoinable.

Now the petitioners devote some ten pages to outlining the facts. The distortions in such an outline become readily apparent when their statement is compared with the analysis of the facts found in the opinion of the Court of Appeals (254 S. W. 2d 335-337; R. 49-51).

COUNTER-STATEMENT OF QUESTIONS PRESENTED.

On pages 15 and 16 of the petition, there are set up four so-called questions which the petitioners ask this Court to determine. Seldom have we seen more loaded questions. Questions 1, 2, and 4 relate to a hypothetical situation where a state court has forbidden "all peace-

ful picketing." The third question is likewise objectionable in that it relates to a hypothetical situation. Accordingly, we desire to restate the questions as we deem them to exist in this case. There are only two, they are:

1. **Have the petitioners properly raised a Federal question in the courts below and has the Kentucky Court passed on that Federal question? If so, was its decision on the Federal Question necessary to the determination of the cause?**

2. **Assuming the Federal question to have been properly raised and to have been passed on, is the decision of the Kentucky Court violative of recent decisions of this Court?**

If the answer to either of these question is "no," then this petition must be denied.

ARGUMENT AND LAW.

I.

This Petition Must Be Denied as Petitioners Raised No Federal Question in the Court Below, and the Kentucky Court Passed on No Federal Question.

Petitioners contend that jurisdiction is conferred on this Court by Section 344 of the Judicial Code (United States Code, Title 28, Section 1257(3), June 25, 1948, c. 646, 62 Stat. 929) (Pet. 15).

To support this contention petitioners state that "the titles, rights, privileges and immunities of petitioner under the Constitution of the United States," which are involved in the instant cause, were set out by petitioner in (Pet. 16):

(a) affidavit of Elgin G. Bartlett (R. 78-81)
(b) briefs and arguments on temporary and permanent injunction and on appeal (Not in record)
(c) petition for rehearing (R. 57-70).

Petitioners also state that in the trial court and the Court of Appeals "the Federal question was assumed to be at issue and was actually decided by each of those Courts, and was necessary to their judgments and decrees" (Pet. 16, 17).

With this statement petitioners rest their case on the matter of jurisdiction.

Petitioner filed only two pleadings, an answer and an amended answer and neither sets up any Federal question (R. 17, 18, 20, 21). They also filed a motion to dissolve the temporary injunction which motion appears nowhere in the Record. The order overruling this motion simply states "it is ordered that this motion be, and it is, hereby overruled" (R. 17).

The Judicial Code section under which petitioners seek certiorari authorizes such "where any title, right, privilege or immunity is *specially set up or claimed* by either party under the Constitution * * * of the United States." (Emphasis supplied.)

This section and other sections relating to review or appeal have been repeatedly construed by this Court. In a recent case, *Wilson* v. *Cook,* 327 U. S. 474, 480, 90 L. Ed. 793, 799, this Court stated:

> "The purpose of this requirement is to restrict our mandatory jurisdiction on appeal * * * and to make certain that no judgment of a state

> court will be reviewed on appeal by this court unless the highest court of the state has first been apprised that a state statute is being assailed as invalid on federal grounds, * * * or, when the statute, as applied, is so assailed, until it has opportunity authoritatively to construe it * * *. This jurisdictional requirement is satisfied only if the record shows that the question of the validity under federal law of the state statute, as construed and applied, has either been presented for decision to the highest court of the state, * * * or, has in fact, been decided by it, * * * and that its decision was necessary to the judgment. * * * The record in this case does not disclose that at any time in the course of the proceedings in the state courts plaintiff asserted the invalidity of a state statute on any federal ground."

This Court has stated that this provision means the Federal question must be set up by "pleading motion, or other appropriate action under the state system of pleading and practice." In *Hartford Life Insurance Co.* v. *Johnson,* 249 U. S. 490, 493, 63 L. Ed. 722, 724, it is stated:

> "It is settled law that this provision means, 'that the claim must be asserted at the proper time and in the proper manner by *pleading, motion, or other appropriate action under the state system of pleading and practice,* * * * and upon the question whether or not such a claim has been so asserted, the decision of the state court is binding upon this Court when it is clear, as it is in this case, that such decision is not rendered in a spirit of evasion for the purpose of defeating the claim of federal rights!" (Emphasis supplied.)

In Kentucky the rule has always been that a Federal question, or, for that matter, any question, a re-

view of which is sought in the Court of Appeals, *must be raised in the trial court in writing either by pleading or motion.* In *Louisville & N. R. Co.* v. *Woodford,* 152 Ky. 398, 153 S. W. 722, 727, 728, it is stated:

> "It is an elementary rule, of almost universal application, that questions not raised in the trial court in some effective and appropriate manner will not be considered on appeal * * *. It may be considered as well settled in this jurisdiction that no error committed during the trial is available upon appeal, unless it has been specifically relied upon in the grounds set forth in support of a motion for new trial. * * * and this is true although objection was made and exception taken to the ruling at the proper time, as was done in this case. * * *
>
> "The office of the pleadings is to make plain the issues between the parties and upon the issues thus raised, the parties are entitled to have the case tried.
>
> "Bearing in mind these elementary rules of pleadings and practice, and turning first to the pleadings, we find no Federal question suggested anywhere. * * *
>
> "In view of the fact that the question had been nowhere raised by the pleadings, instruction, or a motion for a new trial, or by motion of any kind, we must conclude that it was raised orally, and was discussed as an academic question. But, under section 115 of the Civil Code of Practice, pleadings are required to be in writing; by subsection 5 of section 317, instructions must be in writing; and under subsection 1 of section 624, even notices are required to be written. A mere oral request of the trial court to instruct upon any given question brings no question before this Court for review. * * *

> "The Federal question now suggested was not raised in the trial court, is not before us for review, and cannot be considered or decided."

This same case was heard again by the Court of Appeals and is reported at 153 Ky. 185, 154 S. W. 1083. Again the Court stated:

> "The defendant having failed to plead the provisions of the written contract relied on, there was nothing which the Court could consider to sustain the Federal question on the argument of the motion for a new trial. The matter not having been presented in the Circuit Court in such a manner that it could be considered in that court, and the case having been tried in that Court without reference to any of the special provisions of the contract, the defense now suggested is not maintainable in this Court."

This case was even carried to this Court on writ of error and was dismissed because of failure to raise the Federal question. 234 U. S. 46, 51, 58 L. Ed. 1202, 1208. Mr. Justice Day, speaking for the Court, said:

> "If a Federal question can be said to be involved at all, it was introduced into the record upon the argument of the motion for a new trial. Disposing of that question, the Court of Appeals of Kentucky set forth that the question was not raised by the pleadings or requested instructions, or by motion for a new trial, or written motion of any kind, and concluded that it must have been raised orally. It pointed out that under the Kentucky Code of Practice such contentions were required to be in writing, and that if the defendant desired to take advantage of its limited liability, it must, under the Code of the state, specifically rely on the defense in its answer. In making this

holding, the Kentucky court but enforced a rule of practice of that state. The decisions of this Court not only have repeatedly held that a federal right, in order to be reviewable here, must be set up and denied in a state court, but have often held that such claim of denial is not properly brought to the attention of this Court where it appears that the state court declined to pass upon the question because it was not raised in the trial court, as required by state practice. * * *

"It follows that the case must be dismissed for want of jurisdiction."

Applying this rule to petitioners, we find that the only part of the Record in the trial Court in which the Constitution is mentioned is in paragraph 14 of the affidavit of Elgin B. Bartlett (Pet. 16; R. 78-81):

> "The sole purpose of the handbills, signs and picketing of plaintiff's premises was and is to publicize the controversy between plaintiff and Local No. 181, as such of the defendants as participated therein had a right to do so under the Constitution of the United States and for no other purpose."

This statement in affidavit form obviously is meaningless insofar as raising any Federal question. It merely represents an opinion of the affiant which is clearly objectionable as incompetent and irrelevant even had it been made on the witness stand under oath. This was recognized by the trial court in its order and judgment (R. 131) where it is stated:

> "At that time the parties, by counsel, stipulated and agreed that the Court should consider on the plaintiff's motion to make the injunction permanent and on the defendants' application to dissolve the temporary injunction and dismiss the petition,

> all of the evidence, affidavits and exhibits heretofore filed in connection with the application for the temporary injunction subject to *competency and relevancy.*" (Emphasis supplied.)

Petitioners' assertion that the Federal question was raised in briefs and arguments before the courts is equally specious. These briefs and arguments form no part of the Record and are not before this Court.

Recognizing that they had not raised a Federal question, petitioners asked the Kentucky Court in their petition for rehearing to "clearly show that a basic Federal Constitutional question" is involved in the decision (R. 70). This the Court declined to do.

Petitioners next urge that the petition for rehearing itself supplies the missing jurisdictional element. This contention likewise must fail. The Kentucky Court merely denied the petition in this language (R. 71):

> "The Court being sufficiently advised, it is considered that the petition of appellees for a rehearing be and the same is overruled."

This Court has repeatedly held that a Federal question is raised too late on a petition for rehearing unless the court below expressly entertains and passes on it. In *McCorquodale* v. *Texas,* 211 U. S. 432, 437, 53 L. Ed. 269, 270, this Court passed on the identical question and stated:

> "This Court has decided many times that it is too late to raise a Federal question for the first time in a petition for rehearing in the court of last resort of a state after that court has pronounced its final decision. * * * It is true that we have

> also decided that, if the court entertains the motion and passes on the Federal question, we will review its decision. But, it must appear that the court has done so. * * * It can hardly be said to so appear in the case at bar. The order of the Court is nothing more than denial of the motion. In other words, it expresses no more than would be implied from a simple denial of the motion."

In a more recent case this Court has reiterated this rule, *Radio Station WOW, Inc.* v. *Johnson,* 326 U. S. 120, 128, 89 L. Ed. 2092, 2100.

> "Questions first presented to the highest State court on a petition for rehearing come too late for consideration here, unless the State court exerted its jurisdiction in such a way that the case could have been brought here had the question been raised prior to the original disposition."

Having failed to show that the Federal question was raised, nevertheless, petitioner urges that in both the trial court and the Court of Appeals "the Federal question was assumed to be at issue and was actually decided by each of those courts, and was necessary to their judgments and decrees" (Pet. 16, 17).

Nothing could be further from the facts. The Court of Appeals made it crystal clear that it decided this case solely on the *non-federal* ground that the activity, if not enjoined, would violate KRS 336.130.

At the beginning of the opinion is stated (254 S. W. 2d 335; R. 48):

> "The primary question on this appeal is whether picketing under the facts of this case would require appellant, hereinafter referred to as 'Blue Boar', to coerce its employees to join

appellee, called herein, 'The Union', in violation of KRS 336.130."

After analyzing the factual situation beginning September 16, 1949, and continuing to the time of this appeal, the Court stated (339; R. 55):

> "We now come to the question of whether picketing in this case has been and is now illegal because its purpose is to coerce Blue Boar to violate the law of this state as set forth in KRS 336.130."

In its concluding paragraphs, the Kentucky Court summarized the argument of the Union and made its decision (339; R. 55, 56):

> "The Union argues that, even assuming a labor controversy does not exist between it and Blue Boar, peaceful picketing is nevertheless allowable *under the laws of this state* where the sole purpose of such activity is to advertise to the public that it has a labor controversy with Blue Boar. If the picketing is considered in isolation, we could easily arrive at the conclusion that this assertion might have some merit; but, when we set it up against the factual background of this case, it forms part of a pattern which clearly shows that the union has employed methods, from the very beginning, which we think could have had no other effect than to coerce Blue Boar to compel all of its employees to organize. * * * We therefore conclude that the picketing in this case would, if allowed, result in coercing Blue Boar to resort to compulsion to force its employees to join the union in violation of KRS 336.130.
>
> *"In view of our decision, it becomes unnecessary to consider the other ground urged for reversal."* (Emphasis supplied.)

Thus the Kentucky Court explicitly stated that it was deciding the case on the non-federal ground and was not considering the federal ground. Even had it not done so it would have been incumbent on this Court to determine from the record (1) that the Federal question was presented, (2) that the decision was based on the Federal question, and (3) the decision of the Federal question was necessary to the determination of the cause. *Honeyman* v. *Hanan,* 300 U. S. 14, 18, 81 L. Ed. 477, 479.

In *McGoldrick* v. *Gulf Oil Corp.,* 309 U. S. 2, 3, 84 L. Ed. 536, this Court stated:

> "In the absence of an explicit statement by the Court of Appeals that it annuls the assessment of the tax solely because of violation of the Federal Constitution, we are unable to find that the decision of the highest court of the State did not rest upon an adequate non-federal ground. * * * The writ of certiorari is dismissed for the want of jurisdiction."

Summarizing, this Court must dismiss this petition because the petitioner specially set up no Federal question in the courts below and the Kentucky Court expressly based its decision on the non-federal ground and did not consider any Federal question.

II.

Even Had a Federal Question Been Properly Raised and Decided This Court Should Deny This Petition.

The controversy between Blue Boar and the Union in the words of the Kentucky Court had its "genesis on September 16, 1949," when demands were made by officers of the Louisville Federation of Labor that Blue Boar sign a contract with petitioner. The facts of that controversy beginning September 16, 1949, and continuing until July 14, 1950, when the Court of Appeals, five judges sitting, refused to dissolve the temporary injunction, are concisely set forth in the opinion of the Court (254 S. W. 2d 335-337; R. 49-51).

For almost two years this case lay dormant. On June 6, 1952, the Union filed an answer and later an amended answer. These were the only pleadings filed by petitioners. They asserted (a) a labor dispute now existed between Blue Boar and the Union and (b) that Blue Boar had discharged five employees because of union activity.

The Chancellor found at the conclusion of this hearing that these employees were discharged for reasons other than union activity. The Court of Appeals stated (336; R. 51):

> "We think the proof amply sustains this finding by the Chancellor."

Kentucky Statutes guarantee employees the right of self organization free from restraint or coercion, KRS 336.130 provides:

"(1) Employes may, free from restraint or coercion by the employers or their agents, associate collectively for self-organization and designate collectively representatives of their own choosing to negotiate the terms and conditions of their employment, to effectively promote their own rights and general welfare. Employes, collectively and individually, may strike, engage in peaceful picketing, and assemble collectively for peaceful purposes.

"(2) Neither employers or their agents, nor employes or associations, organization or groups of employes, shall engage or be permitted to engage in unfair or illegal acts or practices or resort to violence, intimidation, threats or coercion."

The Court of Appeals, looking to the substance rather than to the claim of the Union, found, in its own words that the union activity here involved (339; (R. 56):

"forms part of a pattern which clearly shows that the Union has employed methods, from the very beginning, which we think could have had no other effect than to coerce Blue Boar to compel all of its employes to unionize. There is abundance of proof to establish the fact that pressure has been exerted on Blue Boar to compel it to sign a contract with the Union and to recognize the Union as a sole bargaining agent for all its employees. Had Blue Boar entered into this contract and lived up to its terms, its employes would have been coerced by it to join the Union regardless of their wishes. * * *"

This Court, in the recent case of *Local Union No. 10, AFL* v. *Graham,* 345 U. S. 192, 97 L. Ed. (Adv. page 542), determined that peaceful picketing could be enjoined by the Supreme Court of Virginia, where the

effect of such picketing was to violate the public policy of Virginia declared in its so-called "right to work" statute.

In *Building Service Employers International Union* v. *Gazzam,* 339 U. S. 53, 94 L. Ed. 845, this Court unanimously held that the Supreme Court of the State of Washington, relying upon a state public policy as expressed in its statutes that workers shall be free to join or not to join a union and that they shall be free from coercion, interference or restraint, could enjoin peaceful picketing, the effect of which picketing would be to violate this declared public policy of the State.

Handed down on the same day and to the same general effect were the cases of *International Brotherhood of Teamsters Union* v. *Hanke,* 339 U. S. 470, 94 L. Ed. 995; *Hughes* v. *Superior Court of California,* 339 U. S. 460, 94 L. Ed. 985.

This Court has this year also denied certiorari in a case almost identical with this case. *International Brotherhood of Teamsters* v. *Postma,* docket No. 446, October term 1952. Certiorari was denied — U. S. —, 97 L. Ed. (Adv., p. 668), and Petition for Rehearing denied — U. S. —, 97 L. Ed. (Adv., p. 851). In the Postma case as in this case the declared public policy of the State of Michigan was that employees should be free to join or not to join any labor organization. The Michigan Supreme Court enjoined peaceful picketing the effect of which would have been and was to violate this declared public policy. This denial of certiorari followed in point of time the decision in the Graham case.

The Kentucky Court of Appeals decided this case solely on the non-federal ground that the effect of the picketing sought would be in violation of the legislatively declared public policy that workers shall be free from coercion by their employer in the matter of self-organization.

Admittedly in the past there has existed some confusion in the state courts since the decision of this Court in *A. F. of L.; et al.* v. *Swing,* 312 U. S. 321, 85 L. Ed. 855. However, recent decisions have served to clarify this. A succinct statement of the present law is found in the concurring opinion of Mr. Justice Frankfurter in the case of *Dennis* v. *United States,* 341 U. S. 494, 529, 95 L. Ed. 1137, 1163:

> "A critique of the cases testing restrictions on picketing is made more difficult by the inadequate recognition by the Court from the outset that the loyalties and responses evoked and exacted by picket lines differentiate this form of expression from other modes of communication. * * * But the crux of the decision in the Thornhill case was that a state could not constitutionally punish peaceful picketing when neither the aim of the picketing nor the manner in which it was carried out conflicted with a substantial interest. In subsequent decisions we sustained restrictions designed to prevent recurrence of violence, * * * or reasonably to limit the area of industrial strife, * * *. We held that a state policy against restraints of trade justified it in prohibiting picketing which violated that policy * * *; we sustained restrictions designed to encourage self-employed persons * * *; and to prevent racial discrimination * * *. The Fourteenth Amendment bars a state from prohibiting picketing when

> there is no fair justification for the breadth of the restriction imposed * * *. But it does not prevent a state from denying the means of communication that picketing affords in a fair balance between the interests of trade unionism and other interests of the community."

In the instant cause the Kentucky Court has balanced the interests of the petitioning Union which has been unable to show that it represents or has ever represented more than 5 out of 270 employees of Blue Boar (R. 43, 44, 49-51 [all five of these were discharged or their employment terminated for reasons totally dissociated with union activity (R. 31, 51)] against the interests of the Commonwealth of Kentucky in assuring that the Blue Boar employees are protected in the rights guaranteed them under law. After balancing these interests it concluded (254 S. W. 2d 339; R. 56):

> "That the picketing *in this case* would, if allowed, result in coercing Blue Boar to resort to compulsion to force its employees to join the Union in violation of KRS 336.130." (Emphasis supplied.)

This is a far cry from the wild and baseless accusations against the Kentucky Court made on pages 20-27 of the petition. Particular attention is directed to the fulminations contained on pages 26, 27 where these statements are found:

> "It follows then, that Kentucky has established a policy that in any case in which an employer refuses to recognize a particular Union and in which 100% of the employes do not belong to the

> Union, picketing will not be allowed,—a strike for recognition would similarly be illegal. * * *
>
> "The instant cause is a flagrant example of a state Court endeavoring to use that reasoning to trespass beyond the constitutional boundaries and protective barriers set up by this Court."

Such intemperate unfounded attacks upon the integrity of the Kentucky Court of Appeals, come with ill grace from a Union which has had two hearings before the Jefferson Circuit Court and two before the Court of Appeals.

Such groundless charges can serve no useful purpose. They add only friction and heat instead of light.

The Kentucky Court has balanced the interests of the Union and the Commonwealth and has determined that under "the facts of this case" an injunction against peaceful picketing is justified. Such a narrowly conceived restriction is entirely consonant with every decision of this Court and the petition should be denied.

CONCLUSION.

In conclusion, we submit that this petition for certiorari must be denied for the reason that petitioners raised no Federal question, nor was any Federal question decided.

Alternatively and not departing from that contention which we submit is uncontradicted on the record, we submit that the decision of the Kentucky Court, based as it is upon the narrow ground that picketing under the facts of this case violates the declared policy

of the Commonwealth of Kentucky, is entirely consistent with the decisions of this Court and that the petition should be denied.

We therefore ask that the prayer of the petition for writ of certiorari be denied.

Respectfully submitted,

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